No. 15184.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PELTA FURS,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of an Order to Cease and Desist.

PETITIONER'S BRIEF ON REVIEW.

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No. 15184.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACQUES DE GORTER and SUZE C. DE GORTER, as individuals and as co-partners trading as PELTA FURS,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITIONER'S BRIEF ON REVIEW.

Statement Re Jurisdiction.

The complaint issued by the Federal Trade Commission charges petitioners with violations of the Fur Products Labeling Act, being Public Law 110 enacted by the 82nd Congress of the United States effective August 9, 1952. It is provided in said Act, in Section 8 thereof, that the Act shall be enforced by the Federal Trade Commission under rules, regulations and procedure provided for in the Federal Trade Commission Act and that the Commission shall prevent any person from violating the Fur Products Labeling Act with the same jurisdiction, powers and duties, as though all terms and provisions of the Commission Act were incorporated in the Fur Act.

It is provided in Section 5(b) of the Federal Trade Commission Act, being Public Law 203, enacted by the 63rd Congress of the United States, as amended, that whenever the Commission shall have reason to believe that any person is using any unfair method of competition or any deceptive act or practice in commerce, it shall issue and serve upon such person a complaint stating its charges and setting a date for a hearing thereon, and in proper cases shall make its order that said person cease and desist from committing such violations.

It is then provided in Section 5(b) of the Commission Act that the jurisdiction of the Circuit Court of Appeals of the United States (now the United States Court of Appeals), to affirm, enforce, modify or set aside Orders of the Commission, shall be exclusive.

Statement of the Case.

That on February 25, 1955, the respondent, Federal Trade Commission, issued its complaint being Docket No. 6297, against petitioners in which it charged that for several years prior thereto petitioners maintained a course of trade in commerce, among and between the various states of the United States, in that petitioners engaged in the purchase, sale and distribution of fur products which when sold by petitioners were transported by them from their place of business in the State of California to purchasers thereof located in various places other than in the State of California. [Trans. p. 3.]

The complaint further alleged that, subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, petitioners introduced, sold, advertised, offered for sale, transported and distributed fur products, in commerce, certain of which fur products were misbranded,

falsely advertised, and falsely invoiced in violation of Section 3(a) of the Fur Products Labeling Act and of the Rules and Regulations promulgated thereunder. [Trans. p. 4.]

The complaint further alleged that, subsequent to the effective date of said Act, petitioners sold, advertised, offered for sale, transported and distributed *fur products* which were made in whole or in part of *"fur" which had been shipped and received in commerce,* as "fur products" and "fur" are defined in the Fur Products Labeling Act, certain of which fur products were misbranded, falsely advertised, and falsely invoiced in violation of Section 3(b) of said Act and of the Rules and Regulations promulgated thereunder. [Trans. p. 4.]

The complaint then set forth specific acts of labeling, advertising and invoicing claimed to be false and deceptive under the provisions of Section 5(a) of the Fur Products Labeling Act and Rule 44 of the Rules and Regulations promulgated thereunder, and the complaint then alleged that these violations of the Fur Act and its Rules constituted unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act. [Trans. p. 11.]

The complaint contained a notice directed to petitioners to appear and to show cause at a Hearing to be held before a Hearing Examiner of the Federal Trade Commission on the charges set forth in the complaint and to show cause why an order should not be made requiring petitioners to cease and desist committing the violations of law charged. [Trans. p. 17.]

An answer to the complaint was filed by petitioners in which they denied that they were engaged in interstate commerce although admitting that in a few isolated in-

stances fur products sold in their place of business to purchasers present therein were at the request of the purchasers shipped to an address outside of the State of California. [Trans. pp. 25, 36.]

Petitioners further denied in their answer that they committed the acts complained of in the complaint, and more particularly, denied that they used "fictitious" prices as comparative prices or in advertising reductions and savings in the sale of fur products, and petitioners alleged in their answer that the word "fictitious" which appeared in Rule 44 of the Rules and Regulations promulgated by the Federal Trade Commission, was improperly and incorrectly defined and construed in the complaint by the attorney who had prepared the complaint. [Tr. pp. 26-29.]

A hearing on the issues made out by said complaint and answer was had on July 5th and 6th, 1955, at Los Angeles, California, before the Honorable Abner E. Lipscomb, Hearing Examiner, and after the hearing, the matter was taken under submission by said Hearing Examiner.

That thereafter and before said Hearing Examiner made his Initial Decision, petitioners filed Proposed Findings of Fact, Conclusions of Law and a Proposed Order which were adopted in part and rejected in part by the Hearing Examiner.

The Hearing Examiner made and filed his Initial Decision with the Federal Trade Commission on November 18, 1955, a copy of which was served by the Commission on the petitioners by registered mail on December 5, 1955. The Hearing Examiner in his Initial Decision, found that petitioners committed all of the acts complained of in the complaint and concluded that such acts, except

those in violation of Rule 44 of the Rules and Regulations, were violative of the Fur Products Labeling Act and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. Based upon these findings and conclusion, the Hearing Examiner made an Order, in his Initial Decision, that petitioners cease and desist from continuing said acts and conduct, other than those in violation of Rule 44, in the sale, advertising, offering for sale, transportation or distribution of fur products in commerce, or in the sale of "fur products" made of "furs" shipped and received in commerce.

The Hearing Examiner, having found that petitioners committed the acts complained of in the complaint with respect to Rule 44 of the Rules and Regulations and concluding that such acts, while not violative of the Fur Products Labeling Act, did constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act, made a further order that the petitioners cease and desist from continuing said acts and conduct in connection with the offering for sale, advertising and distributing of fur products in commerce.

Petitioners, being dissatisfied with some of said Findings and Conclusions and with the second portion of the Cease and Desist Order made by the Hearing Examiner and filed by him with the Federal Trade Commission, filed with the Federal Trade Commission on December 9, 1955, their Notice of Intention to Appeal from said Cease and Desist Order. [Trans. p. 37.]

The attorney in support of the complaint, being dissatisfied with that portion of the Cease and Desist Order

made by the Hearing Examiner which in effect held that Rule 44 of the Rules and Regulations was promulgated without authority under the Fur Products Labeling Act, filed his Notice of Appeal from that portion of the Cease and Desist Order.

Briefs were filed, by petitioners and by the attorney in support of the complaint for the Commission, in both appeals, and on May 11, 1956, the respondent Commission made its Findings of Fact and Conclusions of Law and its Cease and Desist Order in which it ordered petitioners to Cease and Desist from committing the acts alleged in the complaint to be violative of the Fur Products Labeling Act and its Rules and Regulations, not only in connection with the introduction, sale, advertising or offering for sale, or the transportation or distribution of any fur product in commerce, but also in connection with the sale, advertising, offering for sale, transportation or distribution of fur products in intrastate sales. [Trans. pp. 38-72.]

The Cease and Desist Order was served upon petitioners by United States mail on May 23, 1956.

Petitioners being dissatisfied with the Order made by the Federal Trade Commission did, on July 9, 1956, within sixty days after the making of said Order, file with the above entitled court their Petition for Review of the Order of the Federal Trade Commission [Trans. pp. 143-152, incl.] and petitioners did on August 31, 1956, file with the above entitled court their Statement of Points Relied Upon on Review. [Trans. p. 153.] Copies of each of said instruments was served upon counsel for the government.

The questions involved upon this Review, are as follows:

1. Does the evidence support the Findings of Fact and Conclusions of Law made by respondent Commissioner that petitioners are engaged in interstate commerce within the concept of "commerce" under the Federal Trade Commission Act and Section 3(a) of the Fur Products Labeling Act?

This question requires a review of the evidence [Trans. pp. 80-82, incl.; pp. 126-128, incl.], an interpretation of the acts in question and respondent Commissioner's Finding of Fact. [Trans. p. 40.]

2. Does the evidence support the Findings of Fact and Conclusions of Law made by the respondent Commissioner that petitioners are engaged in interstate commerce within the broader concept of "commerce" under Section 3(b) of the Fur Products Labeling Act?

This question involves an interpretation of the Fur Act and the Findings of Fact of respondent Commissioner. [Trans. pp. 39-40.]

3. Does the complaint charge that the unfair methods of competition allegedly engaged in by petitioners is independent of, and unrelated to, the Fur Products Labeling Act and the rules and regulations promulgated thereunder?

This question involves an interpretation of the complaint. [Trans. pp. 11-17, incl., and the Fur Act.]

4. Assuming that petitioners are engaged in interstate commerce, are they required to abide by the provisions of Rule 44 of the Rules and Regulations promulgated by the Federal Trade Commission pursuant to Section 8(b) of the Fur Products Labeling Act?

This question involves an interpretation of the language of the Fur Act and judicial construction of legislative language.

5. Assuming that petitioners are required to abide by Rule 44, either as a rule properly promulgated by the respondent Commissioner under the Fur Act, or as a standard of conduct under the Federal Trade Commission Act, irrespective of the Fur Act, have petitioners violated subdivisions (a), (b), and (c) of said Rule?

This point involves a review of the evidence [Trans. pp. 90-135, incl.], respondent Commissioner's Findings of Fact [Trans. pp. 45-46], and the interpretation of the language of said subdivisions.

Specifications of Error.

1. The respondent Commission erred in finding and concluding from the evidence that petitioners are engaged in interstate commerce as contemplated by the Federal Trade Commission Act.

The evidence shows that petitioners did not sell fur products in interstate commerce; that they transported in interstate commerce seven fur products out of ten hundred sixty-three separate sales of fur products made by them in purely intrastate transactions. Such evidence does not support the finding and conclusion that "this constitutes a course of trade in commerce among and between the various states of the United States, as 'commerce' is defined in the Federal Trade Commission Act." [Trans. p. 40.]

2. The respondent Commission erred in finding and concluding from the evidence and from its interpretation of Section 3(b) of the Fur Act, that petitioners are en-

gaged in interstate commerce under the broad concept of commerce contemplated by said Section.

The evidence shows and respondent Commissioner found that the petitioners sell "fur products" which "fur products" are shipped to them in interstate commerce; the evidence does not show, nor did the respondent Commission find, that petitioners sell "fur products" made of "fur" which has been shipped or received by petitioners in interstate commerce; the evidence shows that petitioners advertised "fur products" in local newspapers which have some interstate circulation but there is no evidence that such advertisements are, "advertisements for sale in interstate commerce"; petitioners did not stipulate that they are engaged in interstate commerce; the foregoing evidence and findings does not support the conclusion of respondent Commissioner that such conduct "brings their business activities within the concept of commerce under the Fur Products Labeling Act." [Trans. p. 40.]

3. The respondent Commission erred in concluding that petitioners are charged in the complaint with the commission of unfair and deceptive acts and practices and unfair methods of competition under the Federal Trade Commission Act independently of violations of the provisions of the Fur Act and the rules and regulations promulgated thereunder.

The complaint charges violations of the Fur Products Labeling Act and the rules and regulations promulgated thereunder and that such violations constitute unfair and deceptive acts and practices in commerce; there is no allegation that a rule comparable to Rule 44 was promulgated under the Commission Act.

4. The respondent Commission erred in concluding that it had authority to promulgate Rule 44 by virtue of the provisions of Section 8(2)(b) of the Fur Act.

Section 8 of the Fur Act authorizes respondent Commission to promulgate such rules and regulations as are necessary for administration and enforcement of the Act and does not authorize the promulgation of rules extending the coverage of the Fur Act and constituting legislation.

5. The respondent Commission erred in making that portion of its Cease and Desist Order denominated C(2)(a), (b) and (c) since said portion of the Order is contrary to law and based upon a definition of the word "fictitious" not contained within the language of Subdivision (a) of Rule 44.

The word "fictitious" contained in Rule 44 is not defined as "any price at which the fur product has not been sold within the recent regular course of business" of the affected person; the definition of the word "fictitious" as contained in the complaint is not in accordance with the ordinary and accepted definition thereof.

6. The respondent Commission erred in making any Order that petitioners cease and desist from committing any of their acts or conduct in the operation of their business.

Since the evidence does not support the findings or conclusions that petitioners are engaged in interstate commerce under any concept thereof, the respondent Commission was without jurisdiction to make any Cease and Desist Order.

Summary of Argument.

I.

The evidence and findings of fact require the conclusion that petitioners are not engaged in interstate commerce in the operation of their business.

II.

Assuming petitioners are engaged in interstate commerce they are nevertheless not bound by the provisions of Rule 44 of the Rules and Regulations promulgated by the Federal Trade Commission pursuant to the Fur Products Labeling Act.

III.

Petitioners are not charged with having violated the Federal Trade Commission Act independently of and without reference to the Fur Products Labeling Act and its rules and regulations.

IV.

In order for petitioners to be charged with unfair acts and conduct in commerce, and unfair competition under the Federal Trade Commission Act, the Commission would have had to adopt rules and regulations under said act comparable to those contained in Rule 44 of the Fur Act.

V.

The United States Court of Appeals has power to conform an order of the Federal Trade Commission to pleadings and findings and to powers conferred by Congress.

VI.

Assuming petitioners are required to abide by Rule 44, they have not violated said rule or any of its subdivisions.

ARGUMENT.

I.

The Evidence and Findings of Fact Require the Conclusion That Petitioners Are Not Engaged in Interstate Commerce in the Operation of Their Business.

Interstate commerce is defined as "commerce among the several states or with foreign nations or between points in the state but going through any place outside said state."

Fur Products Labeling Act, Sec. 2(j);
Federal Trade Commission Act, Sec. 4.

Although goods may at one time have been the subject of interstate commerce, they may nevertheless, at another time, become the subject of intrastate commerce when commingled with the bulk of goods within a state after arriving at their destination.

General Tobacco Co. v. Fleming, 125 F. 2d 596;
Vance v. Vandercook, 170 U. S. 438;
Packer Corporation v. Utah, 285 U. S. 105;
Schecter Poultry Co. v. United States, 295 U. S. 495;
Magano v. Hamilton, 292 U. S. 40;
Winslow v. Federal Trade Commission, 227 Fed. 206.

Paragraph 2 of the complaint alleges that petitioners are engaged in the purchase, sale and distribution of "fur products" and that petitioners caused said "fur products," when sold, to be transported from California to purchasers located in various other states, and concludes, therefore, that petitioners are engaged in interstate commerce. [Trans. p. 3.]

While petitioners are not charged, in this paragraph, with selling in interstate commerce, but only with transporting in interstate commerce, they are charged in paragraph 3 of the complaint with introducing, selling, advertising, offering for sale, transporting and delivering, *"fur products" in interstate commerce.* [Trans. p. 4.] The basis of this charge is Section 3(a) of the Fur Act.

Petitioners are also charged in paragraph 3 of the complaint with selling, advertising, offering for sale, transporting and distributing "fur products" which have been made in whole or in part of *"fur" which had been shipped or received in commerce.* [Trans. p. 4.] The basis of this charge is Section 3(b) of the Fur Act.

Petitioners are not charged with violating Section 3(c) of the Fur Act which pertains to the sale, etc., of "furs" as distinguished from "fur products."

Petitioners are unable to find any cases, involving the interpretation of interstate commerce, in which it has been held by the Federal courts that a retail merchant is engaged in interstate commerce in the sale of his products solely because in infrequent and isolated sales, *made in his place of business,* such products find their way into interstate transportation channels. The findings of fact made by the respondent Commission, as well as the evidence, clearly shows that while petitioners are engaged in the sale and distribution of "fur products," all of the sales are made in their place of business in Los Angeles, California, to purchasers who are present in petitioners' place of business at the time of such sales. These findings further show that all such "fur products" were delivered to purchasers thereof in petitioners' place of business, except that the evidence does show that out of 1063 separate sales made by petitioners in the months of

September, October, November and December, 1953, seven "fur products" were transported by petitioners to the purchaser's address outside of the State of California. [Trans. p. 40; pp. 126-128, incl.] It is reasonable to infer, at least there is no proof to the contrary, that this small percentage (.006+) of sales of "fur products" not delivered in petitioners' store, generally prevails in petitioners' business. The fact that in these purely local agreements for the sale of "fur products," a small fraction of the purchasers decide to have their purchases shipped out of the State, instead of accepting delivery at petitioners' place of business, does not change the character of petitioners' business from a purely intrastate one to an interstate one.

These facts do not support, either the conclusion reached by the respondent Commission, or the charge contained in paragraph 2 of the complaint, that petitioners, *in the sale of "fur products" maintain a course of trade in interstate commerce.*

According to the rules of statutory construction the language of Section 3(b) of the Fur Act contemplates an "advertising for sale in commerce," as distinguished from, an "advertising in commerce." The language employed in the Section is *advertising or offering for sale in commerce.* The use of the disjunctive "or" requires that the Section be read as follows: "advertising for sale in commerce, or offering for sale in commerce."

Since the evidence shows that petitioners were not engaged in the sale of "fur products" in commerce; that all business was conducted locally in petitioners' place of business in Los Angeles, California; and that all sales and all deliveries (except isolated ones) were made in petitioners' store, the advertising caused to be disseminated

in the Los Angeles Examiner was not an "advertising for sale in commerce."

Furthermore, the Order, made by respondent Commission, indicates that the correct interpretation of Section 3 (a) of the Fur Act requires that the advertising must be in connection with *an "offering for sale in commerce" of the "fur product."* The Order made by respondent restrains petitioners from "advertising or offering for sale . . . any fur product in commerce." [Trans. pp. 52, 57.] The mere fact of advertising, disconnected from, and in no way related to, the doing of business, either in the sale of a commodity, the sale of a service. the solicitation of funds, the sale of intelligence or anything which requires further action on the part of the advertiser or the person reading the advertisement, does not constitute *engaging in business in commerce.* The advertising must contemplate the eventual entry into the stream of interstate commerce of the "fur product" in order to affect interstate commerce and make the advertiser amenable to the provisions of the Fur Act.

It is inferred, by respondent Commission, from its reference to the fact that petitioners purchase *"fur products" outside the State of California,* that the provisions of Section 3(b) of the Fur Act contain a further definition of interstate commerce. Respondent concludes, that since 25% of petitioners' "fur products" were shipped to them from outside the State of California and subsequently advertised in newspapers in interstate commerce, petitioners are engaged in interstate commerce as defined by Section 3(b) of the Fur Act.

The conclusion of respondent is contrary to its own findings of fact construed in the light of Section 3(b) and is also a misconception and a misinterpretation of the purport of Section 3(b) of the Fur Act.

Sections 3(a), 3(b) and 3(c) of the Fur Act are not *definitions of interstate commerce,* but are declarations of what conduct, on the part of persons who are engaged in interstate commerce, constitutes unfair methods of competition and unfair acts and practices which subjects them to prosecution by the Federal Trade Commission, either by criminal proceedings or by injunction.

Should the Commission's conclusion be justified, that Section 3(b) of the Fur Act constitutes a further definition of interstate commerce, an examination of Sections 3(a), 3(b) and 3(c) and an analysis of the Commission's findings in the light of these sections, clearly demonstrates that petitioners are not engaged in interstate commerce within the purview of Section 3(b) of the Fur Act as charged in paragraph 3 of the complaint.

Section 3 of the Fur Act is divided essentially into three different and distinct categories:

(1) The sale, etc., *in commerce of fur products;*

(2) The sale, etc., *in commerce of fur;* and,

(3) The manufacture, etc., of *"fur products"* (not necessarily for sale in commerce) but made in whole or in part of *"fur" shipped and received in commerce.* (Fur Act, Sec. 3(b).)

Definitions of "fur" and "fur products." Section 2(b) of the Fur Act defines "fur" to mean any animal skin or part thereof in its raw or processed state; Section 2(d) defines "fur product" to mean any article of wearing apparel made in whole or in part of "fur."

Section 3(b) of the Fur Act, unlike Sections 3(a) and 3(c), deals with manufactured *fur products,* which have not found their way into interstate commerce, but which have been manufactured in whole or in part of

"furs" which have been shipped and received in commerce. It is the shipping and receiving, in interstate commerce, of *"furs"* (*skins*) that causes the manufactured "fur product" (wearing apparel), to become a part of interstate commerce.

Section 3(a) of the Fur Act condemns as an unfair practice the introduction, manufacture for introduction, the sale, advertising or offering for sale, transportation or distribution, *in commerce* of any "fur product." It should be observed that each act is followed by the words, *"in commerce"* or *"into commerce"* and pertains to "fur products."

Section 3(c) of the Fur Act condemns as an unfair practice the introduction, sale, advertising for sale, transportation, or distribution *in commerce* of a "fur." It should be observed that each act is followed by the words *"in commerce"* and pertains only to "fur" as distinguished from a "fur product."

Section 3(b) condemns as an unfair practice the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any *"fur product"* which is made in whole or in part of *"fur" which has been shipped and received in commerce.* It should be observed that unlike the provisions of Sections 3(a) and 3(c), the acts are not followed by the words "in commerce" and the section speaks of both "fur products" and "furs." The "fur products" become subjects of interstate commerce, not because they are manufactured for sale *in commerce* or advertised for sale *in commerce,* or distributed or transported *in commerce,* but only because *the "furs",* of which they are manufactured, *have been shipped and received in commerce.*

Since it was found as a fact by the Commission, from the uncontroverted evidence, that petitioners obtained approximately 25% of their "fur producers" by means of purchases made outside the State of California, then it follows that petitioners have not violated the provisions of Section 3(b) of the Fur Act. This section could only have been violated if petitioners purchased *"furs"* outside the State of California, *which were then shipped and received in commerce* and then manufactured into "fur products."

The Findings of Fact do not justify the conclusion of the Commission, "that petitioners are engaged in interstate commerce because they advertised their 'fur products' for sale in newspapers having an interstate circulation."

Under Section 3(b) of the Fur Act, it is not interstate advertising, that constitutes interstate commerce, but rather, it is advertising, *of whatever character,* of a "fur product" manufactured of *"furs" which have been shipped and received in commerce,* which constitutes interstate commerce.

Since petitioners have not violated Sections 3(a) and 3(c) of the Fur Act which deals with the sale, advertising and transporting in interstate commerce of "fur products" and "furs" respectively, the conclusion that petitioners are engaged in interstate commerce must find support in the fact that petitioners' operation falls within the provisions of Section 3(b) of the Fur Act.

Section 3(b) does not contemplate the sale, advertising or transporting of either "fur products" or "furs" in interstate commerce; it contemplates the sale, advertising or transportation in intrastate commerce *of "fur products"* but only if such "fur products" are made in whole or in

part of *"furs" (skins) which have been shipped and received in commerce* in the form of "furs" (skins).

It becomes necessary to determine whether the words "shipped and received in commerce" contemplates that the shipment or receipt of the "furs" be by petitioners rather than by some person other than petitioners. It is the contention of petitioners that the only construction to be placed upon the words "shipped and received in commerce" is that the Congress intended that petitioners be a party to the shipment and receipt of the "furs" in commerce; this is made apparent by a consideration of the effect of the principle of "goods come to rest" upon the legislative intent of this section of the Fur Act.

In *General Tobacco v. Fleming, supra,* it was held that a wholesaler is not engaged in interstate commerce, even as to goods shipped to him from outside the state, where such goods are shipped directly to his warehouse, come to rest there, and are commingled with other goods before being resold to customers within the state. In *Vance v. Vandercook, supra,* it was held that the interestate character of a transaction continues until termination of a shipment and delivery at the place of consignment, and in *Packer Corp. v. Utah, supra,* it was held that interstate commerce continues as such until it reaches the point where the parties originally intended that the movement should finally end; in other words, transportation is completed when a shipment arrives at the point of destination and is there delivered.

Articles of interstate commerce are not, because of their origin, entitled to immunity from the exercise of state regulatory power since, when they have finally come to rest, they are no longer in interstate commerce channels. To the same effect is *Schecter Poultry Company v. United*

States, supra, Magano v. Hamilton, supra, and *Winslow v. Federal Trade Commission, supra.*

It appears, therefore, that under the principle of "goods come to rest," personal property, once the subject of interstate commerce, may cease being subject to interstate commerce and may become the subject of intrastate commerce.

By reason of these decisions, it was not possible, constitutionally, for the Congress to provide that a "fur product" shipped and received in commerce continued to be the subject of interstate commerce after its receipt by petitioners and its being commingled with other fur products in petitioners' place of business. By reason of the same principle of law, "fur products" shipped and received in commerce, once received by petitioners and commingled with their goods, are removed from interstate channels even though such "fur products" contain *"furs" (skins) which at one time were shipped and received in interstate commerce.*

There is an exception to the "goods come to rest" principle which made it possible for the Congress to extend the coverage of the Fur Act to a limited extent to "fur products" *sold in intrastate commerce,* and it is an understanding of this exception to the rule which clarifies the purport of Section 3(b) of the Fur Act.

It has been held in several cases decided by the Federal Courts that there is an exception to the "goods come to rest" principle in those situations were "goods", which

flow in interstate commerce channels, are not finished products but are received in interstate commerce for manufacture or processing. These cases hold that after shipment in interstate commerce these "goods" come to rest *only momentarily* for the purpose of manufacture or processing before being offered for sale and are, therefore, still in interstate channels until sold in their new form or state by the person receiving the "goods". This exception to the "goods come to rest" principle contemplates that the unfinished goods must be received by the person who converts them into finished products and then offers them for sale.

To contend that the receipt and shipment in interstate commerce of a "fur" (skin) by persons several times removed from petitioners (who receive only the finished product), does not have the effect of removing the furs from interstate commerce, would be to run afoul of the principle of "goods come to rest." When skins are shipped to New York and received there by manufacturers, they may not as yet have become commingled with other skins or furs in the possession of these manufacturers since, under the exception to the rule, they have only come to rest momentarily and are still in interstate commerce, but, after their manufacture into "fur products" they are only in interstate commerce until received by petitioners in California. Once received in California, these finished products can no longer be said to have come momentarily to rest since they are now parts of "fur products" which have become commingled with other fur products in the possession of petitioners as consignees.

II.

Assuming Petitioners Are Engaged in Interstate Commerce, They Are Nevertheless Not Bound by the Provisions of Rule 44 of the Rules and Regulations Promulgated by the Federal Trade Commission Pursuant to the Fur Products Labeling Act.

Assuming for the sake of argument that petitioners are engaged in interstate commerce, they are not bound by nor are they required to abide by the provisions of Rule 44 promulgated by respondent Commission.

The conclusion that petitioners are not bound by Rule 44 and all of its subdivisions, is based upon the fact that the Federal Trade Commission, in promulgating that rule, exceeded the authority vested in it by the 82nd Congress by virtue of Section 8(b) of the provisions of Public Law 110 entitled "Fur Products Labeling Act." Section 8(b) provides, "the Commission is authorized to prescribe rules and regulations . . . as may be necessary and proper for the purposes of administration and enforcement of this Act."

It is an elementary principle of law that the Congress of the United States cannot delegate legislative powers to any administrative body, and with this rule of law in mind the Congress, in Section 8(b), authorized the Commission to prescribe only such rules *as are necessary and proper for purposes of administration and enforcement.*

Whether or not Rule 44, promulgated by the Commission, is necessary and proper for the administration and enforcement of the Fur Act depends upon the purpose and intent of the Congress as expressed in the language of the Act.

An examination of the material provisions of the Fur Products Labeling Act, in order to determine its scope and subject matter, demonstrates that it was not intended to prohibit pricing practices and that any rules promulgated by the Commission relating to pricing practices is an attempt to promulgate rules, not for enforcement and administration of the Act but for enlargement of its scope and subject matter.

Somewhat indicative of the scope of the Act is the title and preamble which refer to the act as a *labeling act.*

Labeling of fur products and furs can be accomplished by labels attached to the fur products and furs, by price tags, by advertising in newspapers, and by invoicing. By any of these means consumers and others may be informed of the composition of the fur products respecting portions of the skins used, the animals from which the skins were obtained, whether of used or new skins, country of origin of the animals, whether the skins were bleached, dyed or otherwise processed. Consequently, the Act is described as one to protect consumers and others against misbranding, false advertising and false invoicing *of fur products and furs.*

Section 4 defines misbranding of fur products.

Section 5(a) defines false advertising of fur products.

Section 5(b) defines false invoicing of fur products.

All three sections contain subdivisions which provide that a fur product is misbranded, falsely advertised or falsely invoiced if the label or advertisement or invoice does not show;

(a) The name or names of the animal that produced the fur;

(b) That the fur product contains used fur if such is the fact;

(c) That the fur product contains bleached or dyed fur if that is the fact;

(d) That the fur product is composed of paws, bellies and waste fur, if that is the fact;

(r) The country of origin of imported furs used in the product.

And in each instance, the fur product is misbranded, *falsely advertised* or falsely invoiced *if a label, advertisement or invoice* shows the name of an animal other than the name designated in the Fur Guide.

Misbranding is also accomplished if a label fails to show the name of the manufacturer if registered. False invoicing is also accomplished by failing to show the name of the person issuing the invoice.

Section 5(a) further provides that any fur product or fur shall be considered to be falsely advertised if the advertisement, which is intended to aid in the sale of the fur product does not show all of the required information *provided in the subdivisions.*

What Section 5(a) in effect provides, is that any advertisement of a fur product is a false advertisement only if it does not set forth the required information *contained in the subdivisions.* In other words, it is not the inclusion in the advertisement of comparative pricing, whether true or false, that determines if the advertisement is false; the falsity of the advertisement results only from a failure to comply with the requirements of subdivisions 1 to 6 of Section 5(a), and Rule 38, of the Fur Act.

Thus it is apparent, from all of the material provisions of the Fur Act, that Congress is enacting the Fur Products Labeling Act intended to, and did, prohibit the affected persons from labeling, advertising or invoicing fur products in such a manner that prospective purchasers would be led to believe that a fur garment was made of the skins of animals other than the animal from which the skin was obtained; that the fur garment was made of choice portions of the animal's skin instead of paws, bellies or tails, if that be the fact; that the fur garment was made of furs of imported animals rather than domestic animals or parts of each, if that be the fact; or that the skins were not dyed or bleached, if in fact they were, and any other facts or information concerning *the composition or processing of the fur product.*

It is understandable that Rule 38, of the rules promulgated by the Commission, which pertains to advertising of fur products, is necessary and proper for enforcement and administration of the Act, because it provides that the information, *required by the Act itself,* be set out in legible and conspicuous type; that non-required information be set forth in such a manner as not to interfere with the required information and other such requirements, all having reference to the information specifically required by the Act.

Respondent Commission contends that by reason of a catch-all clause the Fur Act does prohibit false pricing advertisements and justifies the promulgation of rules relating thereto.

Assuming that subdivision (5) of Section 5(a) of the Fur Act was intended to be the last subdivision in Section 5(a), its meaning remains unchanged. Subdivision (5),

whether it precedes or follows subdivision (6), reads as follows:

"contains the name or names of any animal . . ., or contains any form of misrepresentation or deception, directly or by implication, *with respect to such fur product or fur.*"

A catch-all clause has the effect of including amongst the prohibited acts only such other acts as are of the same kind, character and category as the specifically enumerated prohibited acts. None of these specifically enumerated prohibited acts relate to the "pricing" of fur products; they all relate to the "composition" of fur products.

Nor is it necessary to apply this elementary rule of statutory construction. The catch-all clause, by its own language, limits the forms of misrepresentation and deception to which it refers to misrepresentations and deception with respect to the fur product or fur. The catch-all clause provides as follows: "contains any form of misrepresentation or deception . . ., *with respect to such fur product or fur.*" It is to be seen that the catch-all clause by the foregoing language prohibits misrepresentation *with respect to the fur product* as distinguished from misrepresentation *with respect to the price of the fur product.*

That too much scope and latitude is claimed by the Commission for the catch-all clause is illustrated by the fact that the identical catch-all clause is contained in the sections of the Act on "misbranding" and "invoicing," where it cannot have the same scope and latitude as is attributed to it in the section on "advertising." Section 4(1) on misbranding and Section 5(b)(2) on invoicing,

contain the same language as is used in Section 5(a)(5) on advertising.

There can be no merit to the contention that with respect to "misbranding" of fur products, the language, "contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product," refers to anything but the description and composition of the fur product. The definition of "invoicing," contained in Section 2(f) of the Fur Act, at least with respect to a retail fur operation, refers to an instrument given to the purchaser after the sale of the fur product is consummated. No purpose is to be served in legislation prohibiting deceptive pricing practices in connection with *invoices given to a customer after the fur product has already been sold.*

The interpretation, construction and effect to be given to the catch-all clause must of necessity be the same in all three instances; the same language cannot have different meanings simply because used in different sections of the Act.

The intent and meaning of the Fur Act is to require all of the affected persons to inform the consumer, by all means possible, of the kind, quality, origin and other particulars of the animal and parts of the animal relating to a fur product so that the consumer can more intelligently make his purchase.

The Fur Act is not a pricing act and any rules and regulations promulgated by the Federal Trade Commission prohibiting pricing practices is not authorized and is beyond the jurisdiction of the Commission to promulgate, *as being necessary and proper, for purposes of administration and enforcement.*

Respondent Commission justifies its position, that the catch-all clause of Section 5(a) (5) proscribes advertising as to pricing, by the following language contained in its opinion [Trans. pp. 61-62]: "Hence, if the acts catalogued as price misrepresentations and the matters which persons are forbidden to advertise under the various paragraphs of Rule 44 are practices *forbidden under the Act itself* (Fur Act), then the rule must be regarded as a valid exercise of the Commission's authority to promulgate rules." This position taken by respondent Commission is based upon the false premise that the Fur Act itself forbids the things contained in the subdivisions of Rule 44. This is the very point under attack on this Petition for Review.

Contrary to this statement and indicative of the fact that respondent recognizes that the Fur Act does not contain any pricing prohibitions is the following language of its opinion [Trans. p. 66]: "The absence of reference in the Act to pricing misrepresentations is nowise controlling."

In *State v. Thompson,* 232 P. 2d 87, it was held that the principle *"ejusdem generis"* requires that general terms appearing in a statute in connection with precise, specific terms, shall be accorded meaning and effect only to the extent that the general terms suggest items or things similar to those designated by the precise or specific terms. In other words, the precise terms modify, influence or restrict the interpretation or application of the general terms, where both are used in sequence or collocation, in legislative enactments. And in *Smith v. Higgenbothom,* 28 A. 2d 754, the rule *"ejusdem generis"* is based upon the supposition that if the Legislature had intended the general words to be considered in an unrestricted sense, it would not have enumerated the particular things.

III.

Petitioners Are Not Charged With Having Violated the Federal Trade Commission Act Independently of and Without Reference to the Fur Products Labeling Act and Its Rules and Regulations.

Petitioners are charged with violating the Federal Trade Commission Act only insofar as they have violated the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

Paragraphs 16 and 20 of the complaint charge that all of the acts committed by petitioners are violative of the Fur Products Labeling Act and the rules and regulations promulgated thereunder, and that it is the commission of these acts which constitute unfair and deceptive practices under the Federal Trade Commission Act. Should Rule 44 be disregarded, as having been promulgated without authority, there would be no violations as to pricing or value representations under the Fur Act, and thus, no unfair or deceptive acts or practices under the Federal Trade Commission Act.

It is the contention of respondent Commission, expressed in its conclusions of law, that the acts and practices of petitioners as alleged in the complaint are violative of the Federal Trade Commission Act and would be so even without the existence of the Fur Products Labeling Act and Rule 44 promulgated thereunder, and it therefore concludes, petitioners are charged in the complaint with having committed acts, with respect to comparative pricing, price savings and reductions, which constitute unfair competition under the Federal Trade Commission Act, irrespective of Rule 44 and of the Fur Products Labeling Act.

However, Section 3 of the Fur Act provides "misbranding and false and deceptive advertising and invoicing, *within the meaning of the Fur Products Labeling Act,* shall be an unfair method of competition under the Federal Trade Commission Act." It becomes apparent that the acts of petitioners which are to be examined are the acts committed in violation of the intent and meaning of the Fur Products Labeling Act, and not in violation of the intent and meaning of the Federal Trade Commission Act.

The Fur Products Labeling Act which prohibits misbranding, false advertising and false invoicing, declares such conduct to be unlawful and provides a criminal penalty in Section 11, for a violation thereof.

Apparently, the Congress of the United States realizing that it would be difficult to obtain evidence of violations of the Act without access to the books and records of the affected persons, and because no person can be required to incriminate himself, evolved a plan to permit a cease and desist proceedings, to which no criminal penalty is attached, to be brought against the affected persons and this plan was accomplished by incorporating in the Fur Products Labeling Act, Section 8 thereof.

Section 8 of the Fur Act provides that the Federal Trade Commission shall enforce the Fur Act in the same manner and by the same procedure and with the same powers as though all applicable terms and provisions of the Federal Trade Commission Act were a part of the Fur Act, and Section 8 further provides that the same immunities and privileges as are provided for in the Federal Trade Commission Act are incorporated in the Fur Act by reference.

It is further provided in Section 8 of the Fur Act that the Federal Trade Commission is authorized to prescribe rules and regulations governing the manner and form of disclosing information required by the Fur Act and such rules and regulations as may be necessary and proper for purposes of administration and enforcement thereof.

It becomes apparent from the foregoing that in order to enforce the provisions of the Fur Products Labeling Act, by a cease and desist proceeding, rather than by a criminal proceeding as provided for in Section 11 of the Act, it becomes necessary that, in any such cease and desist complaint which might be issued, it be alleged, not only that the acts and conduct of the persons charged in the complaint are unlawful and violative of the Fur Act, but, that the acts and conduct, violative of the Fur Act, *also* constitute unfair methods of competition under the Federal Trade Commission Act.

And so it is provided in each of Sections 3(a), 3(b) and 3(c) of the Fur Act, that the misbranding, false advertising and false invoicing is an unfair method of competition and an unfair act under the Federal Trade Commission Act *only* if the misbranding, false advertising or false invoicing is false and deceptive *within the meaning of the Fur Act,* and the rules and regulations promulgated thereunder. It is apparent therefor, from these sections of the Fur Act, that it is not misbranding or false or deceptive advertising or invoicing, standing alone, which is an unfair method of competition under the Federal Trade Commission Act, but it is the misbranding or false or deceptive advertising or invoicing *within the meaning of the Fur Act and its rules* that makes these false and deceptive acts an unfair method of competition under the Commission Act.

In order for a cease and desist proceedings to be brought by the Federal Trade Commission pursuant to Section 8 of the Fur Act, against persons affected by that Act, it is necessary for the complaint to allege (1) the interstate nature of the business, (2) the misbranding or false or deceptive advertising or invoicing of the fur products, (3) that the misbranding or false or deceptive advertising or invoicing was false or deceptive within the meaning of the Fur Act and its rules, *and,* (4) that the misbranding or false or deceptive advertising or invoicing constitutes an unfair method of competition under the Federal Trade Commission Act. (Sec. 3(a), (b), (c).)

In view of the necessity of alleging that the misbranding, etc., constitutes "an unfair method of competition under the Federal Trade Commission Act," any complaint for a cease and desist order *brought under the Fur Act* must make reference to the Federal Trade Commission Act and the prohibition provided therein against unfair methods of competition. (Sec. 3(a), (b), (c).)

The foregoing analysis of the acts in question and a study of the entire complaint must lead to the conclusion that the Federal Trade Commission, in issuing its complaint, sought to charge a violation of the Fur Products Labeling Act and its rules and regulations and the complaint had, of necessity, to refer to the Federal Trade Commission Act in order to support its request for *a cease and desist order* as opposed to a request for the imposition of a criminal penalty under Section 11.

The conclusion of respondent Commission, that the pleading, in paragraph 16, of the same acts which are pleaded in paragraph 5 of the complaint, places the two pleadings in parallel with each other thus making para-

graph 16 independent of paragraph 5, is certainly not warranted, and an examination of the two paragraphs indicates that paragraph 16 is supplemental to paragraph 5 and *is* necessary to complete a cause of action justifying a cease and desist order if one could be justified at all.

Paragraph 5 of the complaint alleges the commission of acts constituting false advertising, and price misrepresentation, relating to Rule 44, while paragraph 16 alleges that those acts were in violation of the Fur Act and constituted unfair and deceptive practices under the Commission Act, both of which allegations are necessary to support a prayer for a cease and desist order under the Fur Act.

IV.

In Order for Petitioners to Be Charged With Unfair Acts and Conduct in Commerce, and Unfair Competition Under the Federal Trade Commission Act, the Commission Would Have Had to Adopt Rules and Regulations Under Said Act Comparable to Those Contained in Rule 44 of the Fur Act.

In 1946 the Congress adopted the Administrative Procedure Act, 5 U. S. C., Chapter 19, Sections 1001 to 1011 inclusive. It is provided in said Act that the adoption of rules and regulations by an administrative agency is legislation on the administrative level within the language of the Statute granting power to the administrative agency as required by the Constitution and its doctrine of nondelegability and separability of powers.

In view of the fact that such rule making is legislation, even though on the administrative level, it becomes necessary, before such rule making can be valid or enforceable, that the administrative agency comply with all of the requirements laid down in the Sections under Chapter 19.

That rules and regulations, not promulgated pursuant to the requirements of Chapter 19, are not valid and enforceable is indicated in *Willapoint Oysters v. Ewing,* 174 F. 2d 676, in which case the Food and Drug Administrator, pursuant to the Food and Drug Administrative Act, made an order, adopting certain rules and regulations, in compliance with the requirements of the Administrative Procedure Act by publishing in the Federal Register the intention to hold a hearing for the adoption of rules and regulations and inviting the public to appear and be heard respecting the proposed rules.

In 1947 the administrator adopted other rules and regulations inconsistent with and contrary to the previous rules and regulations adopted in 1944. In rejecting the contention of the petitioner that the 1944 rules and regulations could not be changed by the administrator except by congressional legislation, the court on appeal held that the 1944 regulations were valid and continued to be so until modified or superseded either by subsequent legislation *or by subsequent regulations adopted in compliance with duly ordained standards of administrative procedure.*

Since the rules and regulations, adopted in 1947 modifying the earlier rules, were adopted in accordance with all of the requirements laid down by Chapter 19 of the Administrative Procedure Act, relating to the making of an order adopting rules and regulations, it was held by the court that the earlier regulations had been effectively and unqualifiedly modified.

It is apparent from the decision in this case that before petitioners herein could be charged with unfair acts and conduct, and unfair competition in commerce under the Federal Trade Commission Act, it would have to be alleged in the complaint that petitioners violated the

Federal Trade Commission Act and rules and regulations promulgated thereunder, setting forth the particular rules and regulations.

And in *Prima Products v. Federal Trade Commission,* 209 F. 2d 405, petitioner, in advertising its paint products used certain terms, in its advertising material, not prohibited by any rule adopted by the Federal Trade Commission. Subsequently the Commission adopted a rule prohibiting and regulating the terms used in advertising paint products.

After the adoption of this rule proceedings were brought against petitioner to restrain the use of the advertising material violative of the rule.

The court rejected the contention of petitioner that since the prohibited advertising material had been used by petitioner prior to the adoption of the rules under the Federal Trade Commission Act, petitioner could continue to use the prohibited material. *Once rules and regulations are adopted,* acts and conduct in violation thereof are prohibited although not previously proscribed by the Commission Act.

There is contained in the Rules of Practice under the Federal Trade Commission Act, 15 U. S. C., Federal Trade Commission, Section 45, procedure for the promulgation of trade practice rules similar to the requirements of the Administrative Procedure Act, hereinabove referred to. The particular rules are Rules 28 and 29.

V.

The United States Court of Appeals Has Power to Conform an Order of the Federal Trade Commission to Pleadings and Findings and to Powers Conferred by Congress.

In *Federal Trade Commission v. Eastman Kodak Co.,* 274 U. S. 619, it was held that on a petition to review an order of the Federal Trade Commission, the U. S. Court of Appeals can determine whether the Commission had properly exercised the administrative authority given it by Sections 41-46 and 57-58 of Title 15 U. S. C. (Fed. Trade Commission Act), and may not sustain or award relief beyond the authority of the Commission.

In *Federal Trade Commission v. Balme,* 23 F. 2d 615, it was held that the U. S. Court of Appeals has power to conform an order of the Federal Trade Commission, on a point of law, to pleadings and findings and may correct a law error in the Commission's order.

VI.

Assuming Petitioners Are Required to Abide by Rule 44, They Have Not Violated Said Rule or Any of Its Subdivisions.

Assuming for the sake of argument, that petitioners are engaged in interstate commerce, and that Rule 44 promulgated by the Federal Trade Commission under the Fur Products Labeling Act was within the Commission's authority to promulgate, the conclusion of respondent Commission that petitioners have misrepresented their prices, is not supported by the evidence. [Trans. pp. 90-135 incl.]

The uncontroverted evidence shows that the comparative prices used by petitioners in their advertising, price

tags and sales talks, were established by them in accordance with a policy of pricing which takes into consideration many factors such as cost, overhead, competition, quality, styling, and other such factors, and that prices were established when the "fur products" were received by petitioners and placed in stock, and in many instances, long before those prices were used as comparative prices in petitioners' advertising.

In paragraph 5 of the complaint it is alleged that in advertising comparative prices, reductions in prices and savings to be effected, petitioners advertised as their regular or usual price, a price which was in fact "fictitious," and in said paragraph a "fictitious" price is declared to be "fictitious" solely because petitioners had not, in the recent regular course of their business, sold any "fur products" at their so-called regular price.

In accepting the definition of the word "fictitious" as used in paragraph 5 of the complaint, respondent Commission disregarded the commonly accepted definition of the word "fictitious," which, in *Webster's New 20th Century Dictionary, published in 1951,* is defined as "feigned, imaginary, not real." To substitute for this definition a declaration that a price of a product is "fictitious" because the product, or a similar one, was not recently sold in the regular course of the business of the merchant, without regard to the factors generally taken into consideration by a merchant in establishing his prices, is to apply an unrealistic and arbitrary yardstick in the pricing field and demonstrates, on the part of officers enforcing the Fur Act, a complete lack of knowledge of practical business pricing considerations.

Were it not for the definition of "fictitious," as used in the complaint, respondent Commission would be com-

pelled to the conclusion that petitioners plainly ticketed or regular price was not "fictitious" in view of its finding that the plainly ticketed price or regular price was realized by petitioners in 50% of their sales, during their regular selling season, and by the further finding that, while petitioners did sell "fur products" at any of the three prices marked on their tickets, they would sell them preferably at the plainly ticketed or regular price, if it was possible to obtain it. [Trans. p. 46.]

Respectfully submitted,

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